STATE OF MICHIGAN

IN THE SUPREME COURT

PAULETTE STENZEL,

Plaintiff-Appellee,

v.

BEST BUY CO., INC.,

Defendant

and

SAMSUNG ELECTRONICS AMERICA, INC.

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals Docket No. 328804

Ingham Co. Cir. Ct.
Case No. 14-000527-NO

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DEFENDANT-APPELLANT SAMSUNG ELECTRONICS AMERICA, INC.'S APPLICATION FOR LEAVE TO APPEAL

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DYKEMA GOSSETT•A PROFESSIONAL LIMITED LIABILITY COMPANY•39577 WOODWARD AVENUE, SUITE 300•BLOOMFIELD HILLS, MICHIGAN 48304

STATEMENT IDENTIFYING ORDER APPEALED AND RELIEF SOUGHT

On December 22, 2016, the Court of Appeals issued a published opinion affirming the grant of summary disposition to Samsung Electronics America, Inc. ("SEA"). (Attached as Ex. A.) On January 20, 2017, the Court of Appeals entered an order vacating Part II(C) of the December 22, 2016 opinion and convening a special panel to resolve a conflict with *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002). (Attached as Ex. B.) On June 27, 2017, the special panel of the Court of Appeals issued a majority opinion and a concurrence to resolve the conflict between the opinion of the original panel and *Williams*. (Attached as Ex. C and D.) This application for leave to appeal is filed on August, 8, 2017, and is therefore timely submitted pursuant to MCR 7.305(C)(2).

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals issued a published opinion in this personal injury case, first noting that the Circuit Court erred in finding plaintiff had not established proximate cause in her claims against SEA and Co-Defendant Best Buy Co., Inc. ("Best Buy"), but then as to SEA, which was added to the complaint without the filing of a motion for leave to amend after it was identified as a notice of nonparty at fault, affirming the grant of summary judgment as the claims were time-barred as to SEA. The Court of Appeals held it was bound, by prior precedent, to find that because SEA was not added by way of a motion for leave to amend, the amended complaint did not relate back to the original filing date. The Court of Appeals then vacated that statute of limitations portion of its ruling and convened a special panel to resolve a conflict regarding the relation back of complaints amended to add defendants notified as nonparties at fault. The special panel reversed the original panel, holding that the claim was not time-barred as to SEA and reversing the trial court's order granting summary disposition in favor of SEA. Should this Court grant leave to appeal, and on appeal, reverse 1) the original Court of Appeals panel on the issue of proximate cause; and 2) the special panel on the statute of limitations, where:

a. The special panel's statute of limitations decision involves legal principles of major significance to the state's jurisprudence because the decision violated bedrock principles of statutory interpretation and separation of powers, and will apply to many cases going forward.

b. The special panel's statute of limitations decision is clearly erroneous and will cause material injustice because it: misinterpreted MCL 600.2957(2) and MCR 2.112(K)(4) by finding an irreconcilable conflict between the two; ignored separation of powers principles in doing so; and misinterpreted MCL 600.2957(2) and MCR 2.112(K)(4) by finding that the relation-back provision in the statute still applies even though the panel invalidated the condition that the Legislature expressly imposed on the right for a claim to relate back, the filing of a motion.

c. The original panel's causation decision involves legal principles of major significance to the state's jurisprudence because proximate cause is often a central issue in the countless personal injury cases filed in this state each year, and summary disposition motions on proximate cause issues are very common, yet lower courts have received little guidance on how to analyze proximate cause in personal injury cases.

d. The original panel's causation decision is clearly erroneous and will cause material injustice because reasonable minds cannot disagree that Plaintiff's fall was not a natural and probable consequence of the negligence alleged against SEA.

Defendant-Appellant SEA answers:	"Yes"
Plaintiff-Appellee Paulette Stenzel would answer:	"No"
The Circuit Court would answer:	"Yes"
The Court of Appeals would answer:	"No"
This Court should answer:	"Yes"

INTRODUCTION

This case involves significant statutory interpretation and separation of powers issues related to the relationship between MCL 600.2957(2) and MCR 2.112(K)(4). The statute and court rule both help to implement the comprehensive statutory scheme that replaced joint and several liability with a system for allocating fault among multiple tortfeasors. Specifically, MCL 600.2957(2) and MCR 2.112(K)(4) permit a plaintiff—under certain conditions—to amend a complaint to add an entity that was identified as a nonparty at fault. Critical to this case, the plain and unambiguous language of MCL 600.2957(2) provides that such an amended complaint will relate back to the date the original complaint was filed only if the plaintiff seeks leave to amend from the court within 91 days of the identification of the nonparty. In contrast, the plain and unambiguous language of MCR 2.112(K)(4) does not address relation back or the conditions that trigger relation back.

For the statutory requirement that a plaintiff seek leave to amend, the Court of Appeals in *Williams v Arbor Home, Inc*, 254 Mich App 439; 656 NW2d 873 (2002) properly concluded that there is not an irreconcilable conflict between the statute and court rule because the statute plainly requires a plaintiff to file a motion to amend, whereas the court rule says nothing on the subject. 254 Mich App at 443. But in this case, the Court of Appeals convened a special panel (consisting of Judges Servitto, Murphy, Cavanagh, Fort Hood, Borrello, Gleicher, and Shapiro) to revisit *Williams*. The special panel first concluded that this Court, by not mentioning anything about seeking leave to amend in the court rule, actually intended to supersede that statutory requirement and make it an amendment of right. And the panel found that abrogating the leave requirement was entirely within this Court's prerogative under separation of powers principles. The panel then concluded that although it ignored part of the statute, the relation-back provision

in the statute is still applicable, regardless of whether a plaintiff seeks leave to amend a complaint.

There are two significant problems with the special panel's decision. First, the special panel ignored the unambiguous plain language of both the statute and the court rule; instead, it appears to have interpreted both through the lens of its own policy views. In so doing, the panel upended a core tenet of statutory and court rule interpretation—clear and unambiguous statutory and court rule language is to be given its plain meaning, and enforced as written. The second problem is the special panel failed to apply the nuanced approach for determining the boundaries between legislative authority and judicial rulemaking authority under the separation of powers principles provided by this court in *McDougall v Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999). As a result, the special panel's decision involves a substantial question about the validity of a legislative act, involves legal principles of major significance to the state's jurisprudence, and is clearly erroneous, each and every one of which justifies review (and reversal) by this Court.

This case also involves the issue of proximate cause (i.e., legal cause) in a personal injury context. In this case, there was an extremely tenuous causation chain between the alleged breach of duty and the alleged injury. Moreover, there were unusual intervening acts by the Plaintiff that substantially contributed to her injury. Yet the original Court of Appeals panel—in just a few conclusory sentences that glossed over the glaring proximate cause deficiencies—reversed the trial court by finding that a reasonable jury could find proximate cause. The original Court of Appeals' opinion is therefore clearly erroneous and will cause material injustice. In addition, because of the lack of guidance from this Court on the standard for proximate cause and the

immense number of dispositive motions that hinge on proximate cause, the Court of Appeals' causation decision involves legal principles of major significance to the state's jurisprudence.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. FACTUAL HISTORY

Plaintiff purchased a Samsung refrigerator/freezer (the "Refrigerator") from Best Buy on May 21, 2011. (First Amended Complaint, attached as Ex. E, ¶6.) The Refrigerator was installed on May 31, 2011. (*Id.* at ¶7; Plaintiff's Dep., excerpt attached as Ex. F, p. 30.) Two days later, on June 2, 2011, at approximately 5:30 p.m., Plaintiff entered her house through its mudroom. She took off her shoes, walked into the kitchen, and discovered that water was leaking in the kitchen. (Plaintiff's Dep., pp. 47-48.) She determined that the water was coming from the Refrigerator's water dispenser. (*Id.* at pp. 50-51.) She tried to stop the water by pulling on the rounded object that a glass is pressed against to dispense water, but that did not work. (*Id.* at pp. 51-52.) She then attempted to shut the water off by pressing buttons on the Refrigerator's control panel. (*Id.*) When that did not work, she called Best Buy. (*Id.* at pp. 53, 55.)

Plaintiff spoke with a Best Buy technician who told her to try to pull the Refrigerator away from the wall to access a valve behind the Refrigerator. (*Id.* at pp. 55, 59-63.) She climbed on the counter to reach behind the Refrigerator but was unable to shut off the water. (*Id.* at p. 61.) At that point, a thin coating of water was on the floor in front of the Refrigerator and around the kitchen's island. (*Id.* at pp. 53, 55.) The Best Buy technician then advised Plaintiff to try to shut off the water main in her home's crawl space. (*Id.* at p. 63.) Plaintiff used a ladder to climb into the crawl space, which had water in it, and was able to turn off the water. (*Id.* at pp. 64-67.) She then spoke again with the Best Buy representative and scheduled a service call for the

following day. (*Id.* at pp. 68-69.) At that point, water had stopped leaking from the Refrigerator. (*Id.*)

Plaintiff then proceeded to clean up the water that was on the floor. She "grabbed every towel in the house" and put them on the floor. (*Id.* at pp. 69-70.) She was able to place enough towels down to cover most of the wet floor. (*Id.* at pp. 70-71.) Initially, she started to wring the wet towels out in the kitchen sink. (*Id.* at p. 71.) When that proved to be too difficult, Plaintiff grabbed a bucket and tried to wring the towels out in the bucket. That also proved to be difficult, so she retrieved laundry baskets and put the wet towels in the baskets. (*Id.*) She then hauled one of the baskets outside. The laundry basked was heavy from the water soaked towels, so she pushed or pulled it on the ground, instead of lifting it. She pushed or pulled it out of the kitchen, into the dining room, down two steps into her home's sunroom, and through a door leading from the sunroom outside. (*Id.* at pp. 71-73.)

Plaintiff diagramed her home and illustrated that the sunroom was located through her kitchen and dining room. The kitchen floor was linoleum, the dining room floor was wood, and the sunroom floor was ceramic tile. (Plaintiffs Dep., pp. 56, 76.) Once outside, Plaintiff hung up some of the towels to dry. She then took the empty basket back inside to get more towels from the kitchen. (*Id.* at pp. 72-73.) Plaintiff characterized herself at the time she was cleaning up the water as "frantic" (*Id.* at pp. 70-71, 80), but stated she had no problems with her footing despite being barefoot. (*Id.* at p. 71.)

Plaintiff was taking a second basket full of wet towels outside using the same route, or returning from outside, when she allegedly fell. (*Id.* at p. 77.) Plaintiff does not recall if she fell after she stepped down the stairs into the sunroom during this second trip, or when coming back in: "I honest to God don't remember whether I stepped down or I was coming back and I think I

was just stepping down." (*Id.* at p. 77.) Plaintiff does not recall whether she had stepped down the steps into the sunroom and then fell, whether she fell while walking down the steps, or whether she fell while coming back in from outside. (*Id.* at pp. 77-81.) Plaintiff was not sure if there was water on the floor of the sunroom when she fell, testifying "I don't know." (*Id.* at p. 80.) She admitted that she did not recall how she fell because it all "happened so fast." (*Id.* at p. 81.)

II. PROCEDURAL HISTORY

A. Circuit Court Proceedings

Two years and almost eleven months after the June 2, 2011 fall, on April 29, 2014, Plaintiff filed her complaint in Ingham County Circuit Court against Best Buy. On February 12, 2015, Best Buy attempted to file a notice of nonparty fault, identifying SEA as a nonparty whose fault may have caused or contributed to Plaintiff's fall. But Best Buy's notice was not filed within 91 days after it filed its Answer, as required by MCR 2.112(K)(3)(c). Therefore, on March 16, 2015, Best Buy filed a motion for leave to file the notice of nonparty fault. (Attached as Ex. G.) Plaintiff opposed the Motion, arguing that she would be prejudiced by the notice because the three year statute of limitations had expired against SEA and therefore, she could not add claims against SEA. (Plaintiff's Brief in Opposition to Defendant's Motion for Leave to File Notice of Nonparty at Fault, attached as Ex. H, p. 3.)

The court held oral argument on the motion. At the argument, Plaintiff also argued that there were no facts to support that this was a product defect as opposed to improper installation, and Best Buy had not done its due diligence to support the notice. (April 1, 2015 Transcript, attached as Ex. I, pp. 7-10.) Best Buy's motion was granted. (April 20, 2015 Order, attached as

Ex. J.) However, Best Buy did not file a notice of nonparty fault after the court granted its Motion, apparently relying on the previously (and untimely filed) notice.

On February 27, 2015, Best Buy moved for summary disposition under MCR 2.116(C)(10), on the grounds that Plaintiff failed to establish causation. The Circuit Court granted Best Buy's Motion at oral argument, holding that Plaintiff could not establish that the Refrigerator or its installation were the proximate cause of Plaintiff's injuries. (April 8, 2015 Transcript, attached as Ex. K, p. 17; July 8, 2015 Order, attached as Ex. L.) The trial court found it dispositive that "plaintiff is unsure what caused her fall or even where the fall exactly took place . . . ." (Ex. K, p. 17.) The trial court also determined that "there's no close connection between defendant's conduct and Plaintiffs fall." (*Id.*)

On May 11, 2015, after the court had ruled from the bench that it would dismiss Plaintiff's claims but before its order to that effect had been entered; almost 3 months after the February 2, 2011 notice of nonparty fault was untimely filed (without a timely notice even being filed after the court granted leave for same); and three years and eleven months after Plaintiff's alleged fall, Plaintiff filed a First Amended Complaint. The Amended Complaint continued to assert claims against Best Buy (despite the earlier ruling from the bench), and added SEA as a defendant. (First Amended Complaint, Ex. E.) Against SEA, Plaintiff asserted claims for negligence, breach of express and implied warranties, and failure to warn. (*Id.*) Plaintiff did not seek leave from the court before filing the First Amended Complaint.

In response, on June 9, 2015, SEA filed a Motion for Summary Disposition under MCR 2.116(C)(7) and (10). (SEA's Motion for Summary Disposition, attached as Ex. M.) SEA argued first that the claims were time-barred—the First Amended Complaint did not relate back to the date of filing of the original complaint because under MCL 600.2957(2), a complaint that

is amended following the filing of a notice of nonparty fault only relates back if the plaintiff moved for leave to amend, which Plaintiff here did not do. SEA's second argument was that even if the Amended Complaint was timely, Plaintiff could not establish proximate cause against SEA—Plaintiff did not know whether water from the Refrigerator caused her fall; her alleged injuries were unforeseeable and too far removed from the alleged defect; and the court had already held, in connection with Best Buy's motion, that Plaintiff could not establish that an alleged defect in the Refrigerator, manufactured by SEA, was the proximate cause of her injuries.

Oral argument took place on July 22, 2015. The court first noted that "this case has been hanging around for four years. They're an absolute known party, no secret about it, we have Best Buy but I threw them out a long time ago….The statute of limitations is three years." (July 22, 2015 Transcript, attached as Ex. N, p. 13.) The court continued:

> Samsung was a party that could have been noticed from the beginning and should have been added. It was completely foreseeable that when you have a suit like this you add in everybody and dismiss them later. You don't do it backwards like this….[W]e're trying to add and relate back and I'm not going to do, to disregard the wisdom of the Court of Appeals in [*Barnes v USAA Cas Ins Co*, unpublished opinion of the Court of Appeals, issued Oct. 21, 2014 (Docket No. 316729)].[1] It is very instructive. It's almost identical to this case.

(Ex. N, pp. 15-16.) An order granting SEA's Motion and dismissing Plaintiff's First Amended Complaint was entered on July 27, 2015. (July 27, 2015 Order, attached as Ex. P.) The trial court relied primarily on the expiration of the statute of limitations as the justification for summary disposition, but clarified that the motion was granted on lack of proximate cause as an alternative ground. (Ex. N, pp. 17-18.)

[1] Attached as Ex. O.

B. Court of Appeals I (original panel)

Plaintiff appealed. On December 22, 2016, a panel (Judges M. Kelley, O'Connell, and Beckering) issued a published opinion affirming the grant of summary disposition to SEA (on statute of limitations grounds) and reversing the grant of summary disposition for Best Buy (on causation grounds). The panel addressed causation first, holding that the trial court erred when it found a lack of factual cause or legal cause against both Defendants. (Original Panel Opinion, Ex. A, pp. 2-3.) For factual cause, the panel concluded that "but for Best Buy and Samsung's alleged negligence, [Plaintiff] Stenzel would not have had water on either her feet or on the floor in the sunroom and she would not have fallen while cleaning up the water caused by the defective refrigerator." (*Id.* at 3.) For legal cause, the panel found that a "foreseeable, natural, and probable consequence of water on the floor is that someone may slip and fall after coming into contact with the water." (*Id.* at 3-4.) The panel rejected the contention that Plaintiff's conduct subsequent to the alleged leak functioned as an "intervening cause" to break the chain of causation, and thought comparative negligence principles were more appropriate for assessing the extent that Plaintiff proximately caused her own injuries. (*Id.* at 4.)

Turning to the statute of limitations issue (as to only SEA), the panel first compared MCL 600.2957(2)[2] with MCR 2.112(K)(4)[3] and concluded that unlike the statute, the court rule does

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[2] MCL 600.2957(2) provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

[3] MCR 2.112(K)(4) provides:

not require leave of court to file an amended complaint adding a nonparty identified in a notice of fault to the suit, if the amended complaint is filed within 91 days of the notice identifying the nonparty. (Ex. A, p. 5.) And the panel noted that unlike the statute, the court rule does not provide that the amended complaint will relate back to the date of the original complaint. The panel then held that this case is controlled by *Williams v Arbor Home*. *Williams* held that "reading the court rule and the statute in conjunction, we conclude that leave of the court is indeed required before an amended pleading adding a nonparty becomes effective." 254 Mich App at 443-44. (Ex. A, p. 5.)

The panel—which included Judge O'Connell—went on to state that "were we not bound by *Williams*, we would follow the reasoning of Judge O'Connell in his partial dissent" in that case. (*Id.*) In that dissent, Judge O'Connell noted that the court rule and statute conflict and in such a case, the court rule controls if it is a matter of procedure. He also was concerned with potential malpractice claims for filing amended complaints without permission of the court. (*Id.* at p. 6). The panel then stated, "following that approach, we would conclude that because [Plaintiff] followed the requirements set forth in MCR 2.112(K)(4), she properly added Samsung as a party and her amended complaint was timely because it related back to the date of her original complaint." (*Id.* at pp. 7-8.) The court noted in a footnote that in the alternative, "*Williams* was wrongly decided for the reasons stated by Judge Zahra in his concurrence in *Bint v Doe*, 274 Mich App 232; 732 NW2d 156 (2008)." (Ex. A, p. 7, n.3.) The panel said it affirmed the Circuit Court's grant of summary disposition to SEA only because it was bound to

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> A party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty. The court may permit later amendment as provided in MCR 2.118.

do so by *Williams* and asked the Court of Appeals to convene a special panel to resolve the conflict. (*Id.* at p. 8.)

On January 20, 2017, the Court of Appeals entered an order vacating Part II(C) of the December 22, 2016 opinion—the part reluctantly affirming the ruling that Plaintiff's claim against SEA was barred by the statute of limitations—and convened a special panel to resolve the conflict with *Williams*. (Ex. B.)

C. Court of Appeals II (special panel)

On June 27, 2017, the special panel of the Court of Appeals issued an opinion and concurrence. The majority opinion (Judges Murphy, Cavanagh, Fort Hood, and Borrello) held that MCL 600.2957(2) and MCR 2.112(K)(4) conflicted on a matter of procedure regarding whether leave of court is required to file an amended complaint to add a nonparty. (Special Panel Opinion, Ex. C, pp. 6-7.) According to the panel, in creating the Court Rule (2.112(K)(4)) this Court "intended to alter or streamline the process outlined by the Legislature" by allowing a party to timely file an amended pleading as a matter of course without seeking leave of court. (*Id.* at 1.) The majority further held that this Court was constitutionally empowered to modify the statutory requirement to seek leave to amend because the requirement was "purely an issue of practice and procedure" that fell within the "exclusive province of our Supreme Court." (*Id.* at p. 8.) Lastly, the majority held that the relation-back provision in the statute is fully applicable despite the panel's abrogation of the statutory requirement to seek leave to amend. (*Id.* at p. 8-9.) The majority reasoned that the legislative intent behind the relation-back provision was to allow a party to add an identified nonparty to a complaint "in all instances if done so timely," and that this Court—when drafting the court rule—"intended to provide assistance and details in implementing MCL 600.2957(2) where needed, not to nullify by silence the Legislature's clear desire to allow the relation back of an amended pleading for purposes of a given period of

limitations." (*Id.* at 9.) In other words, the special panel majority held that regardless of the language of the statute, the court rule trumps and motions are not required to file an amended complaint to add an entity identified in a notice of nonparty fault, as this is an amendment by right; and regardless of the lack of any statement regarding relation back in the court rule, such an amended complaint relates back to the date of the filing of the original complaint.

A concurrence (Judge Gleicher, joined by Servitto and Shapiro) disagreed with the majority regarding the existence of a conflict between MCL 600.2957(2) and MCR 2.112(K)(4). (Special Panel Concurrence, Ex. D, p. 1.) Instead, the concurrence—relying in part on then-Judge (now Justice) Zahra's concurring opinion in *Bint*—concluded that the statute simply clarifies that if a plaintiff elects to seek leave of court to timely amend, the court must grant it. (*Id*. at pp. 2-3.) But the statute does not require that the plaintiff seek leave of court to amend, and the court rule confirms that a timely amendment is valid irrespective of whether the plaintiff sought leave. (*Id.*) Most importantly in the eyes of the concurrence, the statute and the court rule are "entirely consistent with regard to the central and controlling issue: a plaintiff's right to timely amend a complaint to add an identified nonparty at fault as a party." (*Id*. at 3.) As for relation back, the concurrence came to a similar conclusion as the majority by finding that the Legislature intended to provide relation back for "timely added nonparties at fault," and the court rule's silence regarding relation back does not present a conflict. (*Id.* at 4-5.) Therefore, a cause of action relates back if the amendment was timely, regardless of whether the plaintiff sought leave to amend. (*Id.* at 5.)

SEA now seeks leave to appeal from this Court.

STANDARD OF REVIEW

Whether to grant leave to appeal is within this Court's discretion. Should the Court grant leave, this Court reviews summary disposition decisions *de novo*. See, e.g., *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). This Court also reviews *de novo* questions regarding: statutory interpretation, the applicability of court rules, and questions of law related to the applicability of the statute of limitations. *Bint*, 274 Mich App at 233-34.

ARGUMENT

I. THE COURT OF APPEALS SPECIAL PANEL DECISION INVOLVES A SUBSTANTIAL QUESTION ABOUT THE VALIDITY OF A LEGISLATIVE ACT AND INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE.

The special panel of the Court of Appeals violated bedrock principles of statutory interpretation and separation of powers. First, the special panel ignored the unambiguous plain language of MCL 600.2957(2) and MCR 2.112(K)(4). Instead, the Court of Appeals special panel interpreted these provisions so as to reach what it believed to be the most practical result, and what it believed the Legislature and this Court intended. And the special panel improperly got there by cherry-picking and choosing what it clearly believed to be the best parts of each, namely, the court rule's absence of a motion requirement, and the statute's relation back provision, to create its own new rule that is actually contrary to the plain language of the court rule and the statute. By doing so, the Court of Appeals upended a core tenet of statutory and court rule interpretation that this Court has consistently pronounced: clear and unambiguous statutory and court rule language is given its plain meaning and enforced as written.[4] Second,

[4] See, e.g., *McNeil v Charlevoix County*, 484 Mich 69, 75; 772 NW2d 18 (2009); *AFSCME v City of Detroit*, 468 Mich 388, 399; 662 NW2d 695 (2003); *Warda v City Council*, 472 Mich 326, 340; 696 NW2d 671 (2005); *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003); *Haliw v City of Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005).

the special panel failed to apply the nuanced approach for determining the boundaries between legislative authority and judicial rulemaking authority under separation of powers principles that were provided by this Court in *McDougall v. Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999). *McDougall* overruled *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964), which *McDougall* found to have "overstated the reach of our rule-making authority" by failing to accurately "consider the constitutionally required distinction between 'practice and procedure' and substantive law." *McDougall*, 461 Mich at 29-32. *McDougall* was undoubtedly impactful, prompting this Court to overrule another one of its previous decisions in *Gladych v New Family Homes, Inc*, 468 Mich 594, 599-601; 664 NW2d 705 (2003) (overruling *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971)). Yet the special panel employed a pre-*McDougall* approach, merely citing a background passage from *McDougall* while failing to apply the central command of *McDougall*.

Lastly, the fact that the Court of Appeals took the rare step of convening a special panel to resolve a conflict involving the interaction between MCL 600.2957(2) and MCR 2.112(K)(4) illustrates the significance of these issues to the state's jurisprudence. And the fact that just four out of the seven judges signed the majority opinion, while the other three judges disagreed with the majority over the interpretation of the statute and court rule although ultimately agreed with the result, only amplifies the conclusion that Michigan courts and litigants would benefit from this Court's elucidation on the divisive issue.

Because the Court of Appeals' special panel decision involves a substantial question about the validity of a legislative act and involves legal principles of major significance to the state's jurisprudence, leave to appeal is warranted under MCL 7.305(B)(1) and (3).

II. THE COURT OF APPEALS' SPECIAL PANEL DECISION IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE

The Court of Appeals' special panel decision is clearly erroneous because: (1) the statute's leave of court requirement is enforceable because it does not irreconcilably conflict with the court rule, (2) even if the statute's leave of court requirement did conflict, it would supersede the court rule under modern separation of powers principles, and (3) even if the statute's leave of court requirement was superseded by the court rule, the statute's relation-back provision would no longer be applicable.

A. The special panel erred by finding an irreconcilable conflict between the statute and the court rule

MCR 1.104 provides that procedural rules "set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court." See also *People v Carey (In re Carey)*, 241 Mich App 222, 231; 615 NW2d 742 (2000) ("MCR 1.104 . . . provides that rules of practice set forth in statutes that are not in conflict with any of the court rules are effective."); *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 723; 575 NW2d 68 (1997) (same). The same interpretation method applies to statutes and court rules: "Clear and unambiguous language is given its plain meaning and is enforced as written. But language that is facially ambiguous, so that reasonable minds could differ with respect to its meaning, is subject to judicial construction." *Fleet Bus Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). When determining whether a statute conflicts with a court rule, a court must read both in accordance with their plain meanings. *Neal*, 226 Mich App at 722; see also *Staff v Marder*, 242 Mich App 521, 530; 619 NW2d 57 (2000).

A finding that a procedural statute is invalid because it irreconcilably conflicts with a court rule acts as a finding that the statute is unconstitutional on separation of powers principles—specifically—an intrusion on the judicial branch's primary authority to regulate

practice and procedure. Const 1963, art 3, § 2; Const 1963, art 6, § 5; *McDougall*, 461 Mich at 26-27. As explained by this Court in *Neal*, when analyzing whether a procedural statute conflicted with a court rule, a court must proceed with immense caution before declaring a statute to be unconstitutional:

> The power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict. Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.

Id. at 722-23 (quoting *Council of Orgs & Others for Educ About Parochiaid v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997)).

Turning to this case, the Legislature expressly mandated through plain language that a plaintiff must seek leave to amend before adding a nonparty identified by a defendant. Specifically MCL 600.2957(2) provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

(Emphasis added). In contrast, the plain language of MCR 2.112(K)(4) is silent as to whether a plaintiff must seek leave to amend before adding nonparties to a complaint. MCR 2.112(K)(4) simply states:

> A party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty. The court may permit later amendment as provided in MCR 2.118.[5]

[5] MCR 2.112(K)(4) was adopted in 1997, about two years after the "tort reform" amendments that included section 600.2957(2). The Staff Comments to the 1997 Amendments to the court

As properly concluded by the Court of Appeals in *Williams*, there is no irreconcilable conflict based on the plain language of the statute because the statute plainly requires a plaintiff to file a motion to amend, whereas MCR 2.112(K)(4) says nothing on the subject. *Williams*, 254 Mich App at 443 (the court rule "plainly allows a plaintiff to file an amended complaint adding a nonparty but *does not specifically mention* whether leave of the court is also required") (emphasis in original); see also *Barnes v USAA Cas Ins Co*, unpublished opinion of the Court of Appeals, issued Oct. 21, 2014, p. 6 (Docket No. 316729) (Ex. O) ("Absence of the requirement for a motion under MCR 2.112(K)(4) does not nullify the requirement as stated in MCL 600.2957(2) or create a conflict between the statutes, as plaintiff suggests."). Even assuming *arguendo* that the existence of a conflict was a close call, the statute would still prevail because when analyzing a potential conflict between a court rule and a procedural statute, "[e]very reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt." *Neal*, 226 Mich App at 722-23 (quoting *Council of Orgs*, 455 Mich at 570).

But instead of comparing and applying the plain meanings of the statue and court rule, the special panel used an entirely different standard—one that is antithetical to controlling precedent. The panel first explained that the plain language of the statute requires a plaintiff to seek leave to amend. (Ex. C, p. 6).[6] So far, so good. But then the panel took an inexplicable turn and opined on the virtue (or more accurately, the lack thereof) of the statutory requirement to seek leave to amend, concluding that it was "wasteful in regard to time, energy, and resources,

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rules state "new MCR 2.112(K) governs the procedures for identifying nonparties whose conduct is claimed to be a cause of the injury and for adding them as parties. See MCL 600.2957 and MCL 600.6304."

[6] Throughout this section, use of the term "special panel" refers to the majority opinion of the special panel, unless otherwise noted.

as to both the courts and litigants." (*Id.* at 6.) The panel concluded that this Court must have intentionally meant to supersede the statutory procedure after "certainly realizing that the procedure is unnecessarily cumbersome and not conducive to judicial expediency and efficiency." (*Id.* at 7). The special panel completely bypassed the touchstone question of whether the language in the court rule and statute are clear and unambiguous, and if so, whether there is an irreconcilable conflict between that language. *Fleet Bus Credit*, 274 Mich App at 591; *Neal*, 226 Mich App at 722-23. This threshold question was, however, applied in *Williams*. The *Williams* court properly concluded the statute plainly states that leave of court is required, while the court rule plainly is silent on the matter, which necessarily means "leave of the court is indeed required before an amended pleading adding a nonparty becomes effective." *Williams*, 254 Mich App at 443. The special panel—in its conflict resolution role—should have evaluated whether *Williams'* conclusion about the plain language of the statute was correct; instead it applied the wrong standard by skipping the plain language comparison entirely and jumping straight to its own judicial construction of the court rule. See *Fleet Bus. Credit*, 274 Mich App at 591 (judicial construction is only appropriate when language "is facially ambiguous, so that reasonable minds could differ with respect to its meaning").[7]

[7] The special panel's judicial construction is largely based on its view that seeking leave of court where the court must grant leave is "wasteful in regard to time, energy, and resources." (Special Panel Opinion, Ex. C, p. 6.) This conclusion is far from obvious, as notifying the court of an intention to add parties in what could be a very late stage of the litigation can yield numerous benefits, including (1) giving the court an immediate opportunity to confirm that the amendment is timely and that other notice of nonparty at fault procedural requirements have been met before newly added parties are potentially burdened with motion practice, or (2) giving the court an opportunity to immediately revise scheduling orders to avoid prejudice to defendants. Regardless, the virtue of the requirement that a plaintiff must seek leave to amend is irrelevant because the court rule and statute are unambiguous, the statute requires this and the court rule does not speak to it, and their plain language does not conflict.

Even if the special panel first decided that there was indeed ambiguity that gave it a proper basis for looking outside the plain language rule, its conclusion that this Court intended to supersede the statute is unsupported. As the special panel observed, MCR 2.118 (providing general rules for amended pleadings) expressly permits amendment as a matter of course under certain conditions, but otherwise expressly requires leave of court to amend. See MCR 2.118(A) (distinguishing between amendment "as a matter of course" and amendment "only by leave of court"). According to the special panel, MCR 2.118 shows that this Court "was unquestionably knowledgeable of the distinction when promulgating MCR 2.112(K)," thereby lending credence to the panel's conclusion that this Court intentionally deviated from the statute, and meant to remove the leave requirement, when drafting MCR 2.112(K)(4). (Special Panel Opinion, Ex. C, p. 6.) However, unlike MCR 2.118, MCR 2.112(K)(4) never says that a plaintiff can amend "as a matter of course," nor does it use any similar language (such as "matter of right"). Instead, the Court rule "*does not specifically mention* whether leave of the court is also required." *Williams*, 254 Mich App at 443 (emphasis in original). If anything, MCR 2.118 begs the question why—if this Court intended to permit amendment without leave of court and invalidate a statutory provision on constitutional grounds in the process—this Court would not have used any express language (including that employed in 2.118) to do it.

Nor is there any other indication that MCR 2.112(K)(4) was intended to supersede the leave of court requirement in MCL 600.2957(2). Quite the contrary, as MCR 2.112(K) was "essentially intended to implement MCL 600.2957." *Bint*, 274 Mich App at (quoting *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003)). This is evidenced by the fact that: (1) MCR 2.112(K) cites MCL 600.2957 in the court rule's first subsection, which is the court rule's up-front "applicability" section, and (2) the staff comment for the 1997 Amendments

for the addition of Rule 2.112(K) cites section 2957 as one of the corresponding statutory provisions to the rule. At a bare minimum, the fact that two panels of the Court of Appeals (*Williams* and the original Court of Appeals panel in this case) disagreed in published opinions over whether this Court intended to supersede the statute suggests that it was not "so clear as to leave no room for reasonable doubt," which militates against invalidating the statute. See *Council of Orgs*, 455 Mich at 570 (stating that a court will sustain the validity of a statute unless its "invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution").

B. The special panel erred by analyzing the statutory condition in a vacuum and ignoring modern separation of powers principles

In *McDougall v Schanz*, 461 Mich 15, 30; 597 NW2d 148 (1999), this Court set forth a nuanced approach for determining the boundaries between legislative authority and judicial rulemaking authority under separation of powers principles. The conflict in *McDougall* was between MRE 702—providing general expert qualification standards—and a statute that provided expert qualification standards for medical malpractice actions against specialists. *McDougall* noted that under *Perin v Peuler*, rules of evidence were considered procedural in nature and therefore within the Court's inherent procedural rulemaking authority under Article 6, section 5 of the Michigan Constitution, meaning that MRE 702 would supersede a statute to the contrary. But *McDougall* recognized that *Perin* "overstated the reach of our rule-making authority," 461 Mich at 29, by articulating an excessively mechanical approach to classifying laws as procedural or substantive based on superficial characteristics, and then automatically assigning them to the judicial or legislative branches on that basis. Instead, *McDougall* set forth a more functional approach, concluding that a statute will only violate Article 6, section 5 when "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can

be identified." *Id.* at 30. Applying this standard to the facts before it, the *McDougall* Court held that the statute superseded the rule of evidence because the statute "reflects wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists," including the "social costs of defensive medicine," the "allocation of risks," and "the costs of malpractice insurance." *Id.* at 35. In essence, because the "Legislature is authorized to change a common-law cause of action or abolish it altogether, it necessarily has the ability to circumscribe those qualified to give the requisite proofs to establish the elements of the cause of action." *Id.* at 36.

The key take-away from *McDougall* is that it is constitutionally permissible for the Legislature to impose conditions on substantive rights, even if the conditions would traditionally be considered procedural when viewed in isolation. This message was resoundingly confirmed through this Court's application of *McDougall* in *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003). *Gladych* considered the constitutional validity of MCL 600.5856, which imposed conditions on the tolling of the statute of limitations. *Id.* at 598-99. A court rule stated that an action was "commenced" by "filing a complaint with the court," and the statute of limitations periods were in reference to the date an action was "commenced." *Id.* at 598-600. But the tolling conditions expressly stated that the statute of limitations is not tolled by mere filing of a complaint (which would be sufficient under the court rule); instead, the statute required a defendant to be served for the limitation period to be tolled. *Id.* at 598-99. A previous Michigan Supreme Court decision, *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971), limited the application of the tolling conditions from MCL 600.5856 to avoid a conflict with the court rule because of what it perceived to be a procedural conflict. But *Gladych* overruled *Buscaino* based on *McDougall*, concluding that the limitation periods serve substantive goals,

and therefore not only are the limitations periods themselves within legislative authority, but the "additional requirements regarding the tolling of the statute of limitations" supersede the court rule to the extent there is a conflict. *Id.* at 600-601.[8]

In this case, the relation-back provision in MCL 600.2957(2) is clearly substantive in nature and within the legislative prerogative, as recognized by the special panel. (Special Panel Opinion, Ex. C, p. 9.) And the Legislature chose to impose a condition precedent (seeking leave of court) on that substantive right. Moreover, MCL 600.2957(2) itself functions to implement an overwhelmingly substantive statutory scheme that was designed to abolish joint and several liability and replace it with a system "designed to allocate fault and responsibility for damages among multiple tortfeasors." *Kaiser v Allen*, 480 Mich 31, 37; 746 NW2d 92 (2008). Therefore, when MCL 600.2957(2) is viewed in its entirety and within the context of the broader statutory scheme in which it sits, the condition of seeking leave amend is within the Legislature's constitutional authority and would supersede MCR 2.112(K)(4)—but only under the special panel's erroneous view that the court rule even conflicts with the statute in the first place. In sum, the special panel ignored the central premise of *McDougall* and its application in *Gladych* by looking at the statutory leave of court requirement in a vacuum, labeling it as procedural, and then concluding that any court rule in conflict must supersede (especially one that, in the special panel's mind, would make life easier).

C. The special panel erred in deciding that the relation-back provision still applied in the event of a conflict.

When the language of a statute is unambiguous, courts must "presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required

[8] The issue was relevant to the case because the plaintiff filed the complaint one day before expiration of the limitations period, but did not serve the defendant until after expiration. *Gladych*, 468 Mich at 596.

or permitted, and the statute must be enforced as written." *Gladych*, 468 Mich at 597. "[C]ourts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature." *Id.*

MCL 600.2957(2) could not be more clear in its instruction for when the substantive right of relation-back is granted. Subsection 2 contains just two sentences. The first sentence requires a party to seek leave of court to add a nonparty to a complaint within 91 days after identification, and the second sentence states in its entirety: "A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action." MCL 600.2957(2) (emphasis added). The plain language of subsection 2 therefore says that relation back is only permitted if the plaintiff adds the nonparty "under the subsection," which expressly requires leave of court to amend a complaint.

Yet again, the special panel ignored the plain language of the statute when purporting to divine the Legislature's intent. The special panel concluded that the relation-back provision "reflected the Legislature's intent to allow a party, in all instances if done so timely, to amend a pleading to add an identified nonparty at fault." (Special Panel Opinion, Ex. C, p. 9) (emphasis added). But the Legislature did not actually say relation-back is permitted "in all instances if done so timely." Instead the Legislature said that relation back only applies to a "cause of action added under [subsection 2]," and subsection 2 expressly requires not just timeliness, but also leave of court. The special panel's substitution of its own opinion (that timeliness should be sufficient for relation-back) for the plain language of the statute (which also requires leave of court) contravenes the well-established statutory interpretation principles. See *Gladych*, 468 Mich at 597.

Additionally, the special panel should have conducted a severability analysis once it decided that the court rule invalidated the statute's leave of court requirement. *Midland Cogeneration Venture LP v Naftaly*, 489 Mich 83, 95-96; 803 NW2d 674 (2011) (holding that a statutory provision was unconstitutional and then stating that "we must determine whether the entire statute is unconstitutional or whether its last sentence is severable"). The severability standard is provided by MCL 8.5, which provides a presumption that remaining portions of an act will remain valid without their severed portions, "provided such remaining portions are not determined by the court to be inoperable," and "unless such construction would be inconsistent with the manifest intent of the legislature." Here, in the plain language of MCL 600.2957(2), the Legislature manifested a clear intent that the leave of court requirement is a condition precedent to the relation-back provision. Therefore, retaining the relation-back provision in the absence of the leave of court requirement—as the special panel did by virtue of its holding—is "inconsistent with the manifest intent of the legislature." Curiously, despite its cutting and picking and choosing from the statute, the special panel's opinion is completely devoid of a severability analysis.

For all these reasons, the Court of Appeals' special panel opinion is clearly erroneous and will cause material injustice. Leave to appeal should be granted under MCR 7.305(B)(5).

III. THE ORIGINAL PANEL'S CAUSATION DECISION INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE

Proximate cause is often a central issue in the countless personal injury cases filed in this state each year. And summary disposition motions on proximate cause are nearly par for the course. Yet this Court has provided very little guidance on how to analyze proximate cause in

typical negligence cases.[9] In essence, courts are left with the basic question of whether reasonable minds could differ about whether a consequence is foreseeable, with few details on what qualifies as foreseeable, other than a foreseeable result is one that is "natural and probable" (itself a vague standard). This case illustrates an all-too-common result: a trial court granting summary disposition on the basis that there was "no close connection between defendant's conduct and plaintiff's fall," and the Court of Appeals reversing with a vague, conclusory explanation. Admittedly, proximate cause is often a fact intensive issue, and it might not be possible to develop highly detailed and comprehensive standards that can be applied to every conceivable case. But the highest courts in other states have succeeded in expounding on proximate cause standards to provide both lower courts and litigants with guidance that retains flexibility while providing for more predictable and consistent outcomes. See, e.g., *Hain v Jamison*, 28 NY3d 524; 68 NE3d 1233 (N.Y. Dec. 22, 2016) (discussing the contours of its own proximate cause decisions and elaborating on relevant factors, including time, distance, and "whether the original act of negligence was a completed occurrence or was ongoing at the time of the intervening act"). Because the proximate cause standard is a "policy question" that emanates from the common law, *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977), this Court is uniquely situated to speak to a proximate cause standard that is best suited to policy goals.

Due to the lack of guidance on the standard for proximate cause and the immense number of dispositive motions that hinge on proximate cause, the Court of Appeals' causation decision

[9] On July 31, 2017, this Court issued an opinion, *Ray v Swager*, that addressed proximate cause issues, although most of the analysis focused on the difference between factual cause and legal cause, as well as issues unique to the Governmental Tort Liability Act.

involves legal principles of major significance to the state's jurisprudence. Leave to appeal is therefore warranted under MCL 7.305(B)(3).

IV. THE ORIGINAL PANEL'S LEGAL CAUSE DECISION WAS CLEARLY ERRONEOUS, AND WILL CAUSE MATERIAL INJUSTICE

"Legal cause" requires examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). A consequence is foreseeable when it is the "natural and probable result of the negligent conduct." *O'Neal v St John Hosp & Med Ctr*, 487 Mich 485, 496; 791 NW2d 853 (2010). Proximate cause is lacking when an "intervening cause . . . actively operates in producing harm to another after the actor's negligent act or omission has been committed," unless the intervening cause is "reasonably foreseeable." *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). "Generally, proximate cause is a factual issue to be decided by the trier of fact. However, if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should decide the issue as a matter of law." *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

In this case, Plaintiff did not fall in the water that had leaked directly from the refrigerator onto the kitchen floor. Rather, Plaintiff fell in a sunroom two rooms away from the kitchen, after a long series of events, including Plaintiff: (1) trying to stop the water from the Refrigerator, (2) calling and talking with a representative of Best Buy, (3) trying to stop the water from behind the Refrigerator, (4) climbing into a wet crawl space, (5) turning off the main water line, (6) making an appointment with Best Buy, (7) laying down dozens of towels, (8) wringing out towels, (9) retrieving baskets, (10) walking through the house, (11) dragging a basket outside, (12) hanging towels to dry, (13) returning inside, (14) filling up another basket, and (15) pulling that basket

through the kitchen, dining room, and sunroom to go back outside. (Plaintiff s Dep., Ex. F, pp. 47-48, 50-56, 59-73, 75-81.) The Plaintiff speculated that she ultimately slipped either due to her feet already being wet when she entered the sunroom, or from water getting onto the floor of the sunroom from previously dragging wet towels through it. (*Id*. at pp. 78-80.)

Reasonable minds simply cannot disagree that Plaintiff's fall—apparently resulting from dragging wet towels through a room two rooms away from where the alleged leak occurred—was not a natural and probable consequence of a refrigerator leak. As stated by the trial court, "there's no close connection between defendant's conduct and plaintiffs fall . . . . Plaintiff's fall by dragging a basket of towels a second time through her sunroom was not a foreseeable risk for defendant." (April 8, 2015 Transcript, Ex. K, p. 17).[10] After the refrigerator apparently leaked in the kitchen, plaintiff assessed the situation, called Best Buy (among other things), and was far into her cleaning operation before the fall occurred. Plaintiff—entirely through her own conduct—ultimately spread the water to other rooms by dragging wet towels into them, including the sunroom where the fall allegedly occurred, which was two rooms away from the kitchen. This unforeseeable series of events is the epitome of an "intervening cause" that operates to produce harm "after the actor's negligent act or omission has been committed." *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985).

The original Court of Appeals panel (on an issue not taken up by the special panel) erroneously found otherwise with an "explanation" consisting of but a few conclusory sentences.

[10] These remarks from the trial court were made at the hearing for Best Buy's motion for summary disposition on April 8, 2015. At Samsung's motion for summary disposition hearing on July 22, 2015, the trial court relied primarily on expiration of the statute of limitations as the justification for summary disposition, but clarified that the motion was granted on lack of proximate cause as an alternative ground (without elaboration). (July 22, 2015 Transcript, Ex. N., pp. 17-18). The trial court's reasoning for its proximate cause decision regarding Best Buy should apply equally to Samsung. Indeed, the Court of Appeals applied just a single causation analysis for Best Buy and Samsung. (Original Panel Opinion, Ex. A, pp. 2-3.)

The court began with the finding that a "foreseeable, natural, and probable consequence of water on the floor is that someone may slip and fall after coming into contact with the water." (Ex. A, pp. 3-4.) This might be applicable if the Plaintiff slipped on water near the refrigerator that leaked onto the floor. But that isn't what happened here. The Court of Appeals should have asked whether the long series of events that ended with the slip in the sunroom was foreseeable, to which the answer would be a resounding no. Similarly, the Court of Appeals framed the intervening cause issue incorrectly, finding that the intervening cause of "cleaning up the mess" was foreseeable. (*Id.* at p. 4.) This abstract, broad description of the intervening cause is tantamount to assessing the facts while wearing a blindfold. Of course "cleaning up the mess" is foreseeable in the event of a spill, in the most general sense. But the Court of Appeals erred by making no effort to consider the controlling question: whether the long intervening series of events that contributed to the fall was foreseeable (which it clearly was not).[11] The Court of Appeals should have affirmed the dismissal of the claims against SEA as time-barred, as set forth above; but even if the Court finds they were not time barred, they failed due to the lack of proximate causation.

For these reasons, the Court of Appeals' opinion is clearly erroneous and will cause material injustice. Leave to appeal should be granted under MCR 7.305(B)(5).

[11] The Court of Appeals also suggested that because the purported intervening act was performed by the Plaintiff, the analysis automatically shifts to a comparative negligence fact question that must be decided by the jury. (Original Panel Opinion, Ex. A, p. 4.) However, the case it cited in support—*Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998)—does not stand for that proposition. And it is unclear why a defendant should be able to rely on intervening cause as a complete defense when the intervening actor is a third-party, but if the plaintiff acts in the identical manner as that third-party in bringing about the injury, the defendant is automatically left with a comparative negligence fact question for the jury.

CONCLUSION AND REQUEST FOR RELIEF

For the above stated reasons, Defendant-Appellant respectfully requests that this Court grant its Application for Leave to Appeal, and on appeal, reverse the Court of Appeals' opinions and reinstate the Circuit Court opinion and order.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Dated: August 8, 2017

By: */s/ Jill M. Wheaton*

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INDEX TO EXHIBITS

CERTIFICATE OF SERVICE

I certify that on August 8, 2017, I electronically filed ***Defendant-Appellant Samsung Electronics America, Inc.'s Application for Leave to Appeal*** with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF participants. I have also served this paper upon:

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by enclosing a copy of the same in envelopes properly addressed, and by depositing said envelopes in the United States Mail with postage thereon having been fully prepaid.

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